No. 15446

(In Admiralty)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, Deceased, *et al.*,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Appeal From the United States District Court for the Southern District of California, Central Division. Hon. Thurmond Clarke, Judge.

Answer to Petition for Rehearing on Behalf of Respondent Transocean Air Lines, Inc., a Corporation.

CRIDER, TILSON & RUPPE,
HENRY E. KAPPLER,
548 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellee and Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

No. 15446

(In Admiralty)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, Deceased, *et al.*,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Appeal From the United States District Court for the Southern District of California, Central Division. Hon. Thurmond Clarke, Judge.

Answer to Petition for Rehearing on Behalf of Respondent Transocean Air Lines, Inc., a Corporation.

I.

There Is No Merit to the Suggestion That This Court Has Failed to Apply the Applicable Law Relating to the Doctrine of Res Ipsa Loquitur.

Preliminarily Respondent wishes to point out that Petitioner again relies heavily on *Desmarias v. Beckman,* 98 F. 2d 550. While this court stated in its opinion that he *Desmarias* case was in admiralty, a check of the file ctually reveals that the action was commenced under the

Alaska Territorial Wrongful Death Act and therefore must have been brought on the law side of the court and not in admiralty.[1]

The complaint in the companion case, *Haasman v. Pacific Alaska Air Express,* 100 Fed. Supp. 1, sought $15,000.00 damages and $3,000.00 attorney's fees. This was in accordance with the Alaska Wrongful Death Act (Sec. 61-7-3 of the Alaska Compiled Laws Annotated), which provides that for damages for wrongful death, the recovery shall not exceed $15,000.00. A provision in the statute is also made for reasonable attorney's fees. In view of the fact that there is not one word in the entire official transcript of record or in the briefs to indicate that suit was brought under the Death On The High Seas Act, it is apparent, in the face of the amount of the prayer and the prayer for attorney's fees, that the suit was actually brought under the state laws.

Petitioners' position apparently is that there is a distinction between the procedural effect of the application of *res ipsa loquitur* in a carrier case as distinguished from other types of cases.

Several early carrier cases are cited by Petitioners, including *Gleeson v. Virginia Midland Railroad,* 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859. Petitioners cite only a portion of the decision, omitting the following particularly pertinent language at 444, where the court states:

> "The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If the accident was in fact the

---

[1]The *Desmarias v. Beckman* appeal is No. 13176, in the possession of the Clerk of this Court in San Francisco.

result of causes beyond the defendant's responsibility, or the act of God, it is still none the less true that the plaintiff has made out a *prima facie* case. When he proves the occurrence of the accident, the defendant must answer the case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense, and it is for the jury to say, in the light of all the testimony and under the instructions of the court, whether the relationship of cause and effect did exist as claimed by the defense between the accident and the alleged exonerating circumstances."

Dean William L. Prosser, in a very illuminating article on the procedural effect of *res ipsa loquitur,* (20 Minn. L. Rev. p. 241) points out that although some of the earlier cases apparently made a distinction between carrier and noncarrier cases, *that such distinction no longer exists.*[2]

The rule in the federal courts was finally crystallized in *Sweeney v. Erving,* 228 U. S. 233, which was cited with approval by this court.

It is interesting to note that the Supreme Court thereafter affirmed the rule of the Sweeney case in a carrier case, *C. and O. Ry. Co. v. Thompson Mfg. Co.,* 270 U. S. 416. In that case, the shipper brought an action to recover from the carrier for damage to an interstate shipment of goods. The Court cites with approval the holding of the *Sweeney* case, *supra,* and states as follows, at pages 422, 423:

"The respondent therefore *had the burden of proving the carrier's negligence* as one of the facts

---

[2]See Appendix.

essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the *petitioner* became subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of negligence. *Miles v. International Hotel Co.,* 289 Ill. 320; *Miller v. Miloslowsky,* 153 Ia. 135; *Dinsmore v. Abbott,* 89 Me. 373; *Railroad Co. v. Hughes,* 94 Miss. 242, 246; *Hildebrand v. Carroll,* 106 Wis. 324. The effect of the respondent's evidence was, we think, to make a prima facie case for the jury. See *Sweeney v. Erving,* 228 U. S. 233; *Haines v. Shapiro,* 168 N. C. 34, 35; *Sims v. Roy,* 4 App. D. C. 496, 499. But even if this '*prima facie* case' be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict (*Bushwell v. Fuller,* 89 Me. 600, 602, 603; *Cogdell v. Railroad,* 132 N. C. 852), the trial court erred here in deciding the issue of negligence in favor of the plaintiff *as a matter of law.* For the petitioner introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively intended to exclude the possibility of negligence."

Other carrier cases have consistently applied the rule of the *Sweeney* case:

Robertson v. Washington Ry. & Elect. Co., 279 Fed. 180, at 184;

Underwood v. Capital Transit Co., 183 F. 2d 824;

Capital Transit Co. v. Jackson, 149 Fed. 439.

Dean Prosser states that there seems to be no single question as to the procedural effect of *res ipsa loquitur* on which statements may not be found, in the opinions, on either side. (See Minn. L. Rev. p. 257.)

Confusion in the decisions has been largely due to a failure to recognize the distinction between the method in which the problem has been raised. Thus the defendant may move for a non-suit or directed verdict, claiming that as a matter of law, even if the inference is properly drawn, that there is no case.

We are not confronted with such decisions in the case at bar, since the trial court had all of the evidence before it and the true rule was as is stated in *Sweeney v. Erving,* 228 U. S. 233, *supra,* that the effect of the *entire evidence* is to be determined by the trier of fact.

A succinct statement of the rule may be found in 9 Cal. Jur. 2d 758, where it is stated:

> "Rebuttal of the presumption need not be made by a preponderance of the evidence and where cases speak of defendant's 'burden of proof', to meet the prima facie case established by the presumption, they do not mean the production of a preponderance of evidence. In other words, the normal distribution of the burden of proof between a plaintiff and a defendant in a negligence case is not reversed by the application of the doctrine of res ipsa loquitur . . . *Plaintiff must still prove his case by a preponderance of the evidence.*" (Emphasis added.)

II.

The Ultimate Burden of Proof Remained With Petitioner. It Was for the Trial Court to Determine From All of the Evidence Whether Petitioner Had Sustained His Burden of Proof.

Assuming that the doctrine of *res ipsa loquitur* applies in admiralty, the fact remains that the ultimate burden of proof nevertheless rests upon the plaintiff. As opposed to any inference of negligence which might be created by the doctrine of *res ipsa loquitur,* the trial court had the evidence introduced by the defendant, together with inferences which might be drawn from evidence introduced by the plaintiff, together with the presumption that the pilots had exercised ordinary care for their own concerns and obeyed the law.

The matter of weighing an inference of negligence against the evidence of the defendant is sometimes an extremely difficult task. Prosser has said that, "An inference can no more be balanced against evidence than ten pounds of sugar can be weighed against half past 2:00 in the afternoon."

However difficult the problem may have been, the task of weighing all the evidence, inferences and presumptions, and otherwise, rested with the trial court in a case where conflicting inferences and conclusions may be drawn.

Petitioners' position, when finally analyzed, amounts to an assertion that despite the showing of the Respondent, the petitioner was entitled as a matter of law to a judgment in their favor. As the court states in *Ireland v. Marsden,* 108 Cal. App. 632, at 642:

> "When all the evidence is in, the question for the jury (or trier of fact) is *whether the preponderance is with the plaintiff.*" (Material in parentheses added.)

Petitioners' concept of the doctrine of *res ipsa loquitur* as an arbitrary rule of law entitling them to a judgment, is not warranted by the federal cases or by the authorities in general.

In *Siebrand v. Gossnell,* 234 F. 2d 81, at 87, the court states:

> "Res ipsa loquitur is not some 'exotic doctrine.' It is nothing more than a case of circumstantial evidence where plaintiff has proved enough to get to the jury."

See:

> *F. Texas and Pac. Ry. Co. v. Buckles,* 195 F. 2d 64.

In *Capital Transport Company v. Jackson,* a carrier case, 149 F. 2d 839 at 841, the court states:

> "It (res ipsa loquitur) permits an inference of negligence and thus establishes a prima facie case; in other words, makes a case for the jury."

In *Hufford v. Cicovich* (Wash), 290 P. 2d 709, at 711, the court cites the *Sweeney* case, *supra,* with approval, and states:

> ". . . There is no magic in the phrase 'res ipsa loquitur'. It means simply that the facts and circumstances warrant an inference of negligence, not that they compel it; that they furnish circumstantial evidence of negligence where direct evidence is lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient. Application of the doctrine carries plaintiff past a non-suit, and makes a case to be decided by the trier of facts, but it does not compel a decision favorable to the plaintiffs. . . ."

That respondent offered no evidence as to the cause of the crash is conceded. Neither Petitioners nor Respondent know the cause of the crash. Under these circumstances, to assert that the burden is upon Respondent to explain the cause of the accident is to require of Respondent an impossibility.

"The law never requires impossibilities."

See:

Maxims of Jurisprudence, California Civil Code 3531.

Even assuming that an inference of negligence arises from the disappearance of the plane, all that defendant could do was to introduce evidence opposed to the inferences of negligence and to the evidence produced by plaintiff and any inferences which might reasonably be drawn therefrom. Respondent produced such evidence and no useful purpose would be served by reiterating that evidence in this answer.

Petitioner again asserts that the trial court did not in fact apply the doctrine, although it was applicable. This defendant has more than sufficiently answered petitioners' suggestions in this respect. Petitioners are quibbling with language when they lay stress upon the statement of the court, wherein the discussion of *res ipsa loquitur* was referred to as a "ruling". Irrespective of this, it is obvious that the court kept the matter open for consideration and did in fact receive argument and authorities on the subject matter of *res ipsa loquitur* at a later date, as this court has pointed out.

Under these circumstances there is no reason to assume that the trial court did not in fact apply the doctrine which affords at best merely an inference, and upon

weighing it against the conflicting testimony and presumptions, found the inference wanting, and that Petitioners had failed to establish their ultimate burden of proof.

It is submitted that this Court correctly decided the matter and that there is no basis shown for the granting of a rehearing.

Respectfully submitted,

CRIDER, TILSON & RUPPE, and
HENRY E. KAPPLER,

Attorneys for Appellee and Respondent.

APPENDIX.

PROSSER: PROCEDURAL EFFECT OF RES IPSA LOQUITUR.
(20 Minn. Law. Rev., pp. 260, 261.)

In the simplest res ipsa loquitur case, there is only a permissible inference of negligence. It is significant that many of the jurisdictions which give the doctrine greater effect have been compelled to recognize, under other names, the existence of a type of res ipsa case where there is no more than an inference. The source of the presumption idea is not difficult to trace. It rests largely upon the feeling that all the evidence must be in the possession of defendant, and he should be called upon to explain, under penalty of a decision against him. But it never has been a sufficient defense in a res ipsa case that the defendant has no evidence, and knows no more about the cause of the accident than the plaintiff; and *there is no policy of the law in favor of permitting a party who has the burden of proof in the first instance to obtain a directed verdict merely by a showing that he knows less about the facts than his adversary. Galbraith v. Busch* (1935), 267 N. Y. 230, 196 N. E. 36. Another explanation lies in the fact that many of the early cases were actions by passengers against carriers, and, by analogy to the cases of damage to goods, it was considered that plaintiff had established his case by proving breach of the contract of safe transportation, and defendant thereafter had the affirmative of the issue as to his own due care. *This point of view has merged and become lost in the general 'doctrine' of res ipsa loquitur,* and carrier cases now are treated like others[1] but it has left its mark in many states. (Emphasis added.)

---

[1]Dobie, Bailments and Carriers, sec. 188, p. 608; 4 Elliott, Railroads, Sec. 1644, p. 573; 3 Moore, Carriers, 2d Ed., p. 1477; 3

If the thing speaks for itself, if the inference is sufficiently strong to induce the court to say that it may be drawn, why permit a perverse jury to *refuse* to draw it? If the obvious conclusion from the circumstances is that defendant has been negligent, why not direct a verdict for the plaintiff?

The answer is, that in the usual res ipsa case the inference of negligence is not exclusive, nor is it so strong that we may say as a matter of law that the jury could not reject it. *If the defendant's elevator falls while the plaintiff is riding in it, it may be inferred that there has been negligent construction, failure to inspect, negligent operation. But it may also be inferred that there was a defective cable which could not have been discovered by all reasonable care, or that some unavoidable accident has happened to the machinery. Whether one inference is more reasonable than the other is a question which cannot be determined as a matter of law, and must be left to the jury.*[2]

Hutchinson, Carriers, 3d Ed., Secs. 1413, 1414, pp. 1700 ff. But see *Gordon v. Huehling Packing Co.* (1931), 328 Mo. 123, 40 S. W. 2d 693; *Hartnett v. May Dept. Stores* (Mo. App. 1935), 85 S. W. 2d 644, to the effect that carrier cases involve a presumption, other *res ipsa* cases a mere inference. *Sweeney v. Erving,* 228 U. S. 233; *Central R. R. of N. J. v. Peluso,* 286 Fed. 661 (C. C. A. 28); *Atlas Powder Co. v. Benson,* 287 Fed. 797 (3rd C. C. A.); *Dierks Lbr. Co. v. Brown,* 19 Fed. 2d 732 (8th C. C. A.); *Cochran v. P. Hasburgh & L. E. R. R. Co.,* 31 F. 2d 769; *Blantor v. Great Atl. and Pac. Tea Co.* (C. C. A. 5).

[2]". . . but that inference is still one for the jury and not for the court. They may not believe the witnesses; *the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do;* they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and, in any event, they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant." *Swayze, J., in Hughes v. Atlantic City & S. R. R.* (1914), 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A 927.